APR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 636 of 2002

Dhanesh alias Konda Banjare

Versus

State of Chhattisgarh

JUDGMENT

Noted
A.P.P. 25/5/07

Post for: 25.05.2007

Sd/-
SUNIL KUMAR SINHA
Judge

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 636 of 2002

APPELLANT Dhanesh alias Konda Banjare, S/o Malik Ram Banjare, Aged about 20 years, R/o Village: Jara, P.S.: Kharoura, Distt.: Raipur (C.G.)

Versus

RESPONDENT State of Chhattisgarh, Through District Magistrate, Raipur (C.G.)

(Appeal under Section 374 (2) of Cr.P.C.)

Appearance:

Shri K.K. Singh, counsel for the appellant.

Shri Satish Gupta, Dy. Govt. Advocate for the State/respondent

---

JUDGMENT
(25.05.2007)

Sunil Kumar Sinha, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 11.2.2002 passed in Sessions Trial No. 443/2000 by the Seventh Additional Sessions Judge, Raipur, whereby, the said Court after holding the appellant guilty of the offence punishable under Section 376 (2) (*f*) I.P.C, sentenced him to undergo R.I. for 10 years and to pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 2 months.

2. The brief facts are that on 19.10.2000 at about 19.30 hours, the prosecutrix Ku. Jayalata (P.W.-4), a minor girl aged about 6 years, was playing near her house. The appellant came there, caught her by hands, took her inside a room and

(25)

committed forceful sexual intercourse against her. When she was released, she went to her house and narrated the story to her mother- Smt. Resham Bai (P.W.-1), who noticed the blood stains on her underwear. She called her husband, the appellant was also called and blood like stains on his *loongi* were noticed by them. A First Information Report (Ex.-P/9) was lodged by Smt. Resham Bai (P.W.-1). During the course of investigation, the prosecutrix was sent for medical examination and was examined by Dr. Alka Gupta (P.W.-11), who prepared a report Ex.-P/7, according to which, the girl was of average look and average built, there were no marks of external injury over breast cheeks, abdomen and vulva. There were no marks of internal injury over vulva perineum. Since the girl was not allowing internal examination, she referred her to the Gynaecologist. Later on, she was sent to Dr. Tripti Nagaria (P.W.-12), who was Associate Professor in Medical College, Raipur. She examined the girl on 20.10.2000 and prepared a report Ex.-P/8. According to her report, no external injuries were seen on the body and there were also no injuries on thighs, hymen was intact and opening was circular, there were no tenderness or bleeding from the private part and there was no inflammation therein. According to her, no definite opinion could be given regarding rape. The accused/appellant was also arrested. He was also sent for medical examination and was examined on 21.10.2000 by Dr. S.R. Banjare (P.W.-5), who prepared his report (Ex.-P/2). He noticed one old lacerated wound admeasuring ¼ cm. x .2 cm. on

(26)

the glans penis, which was of 2 days back. According to his opinion, nothing was suggestive which may show that the appellant was not able to perform sexual intercourse. The *loongi*, underwear & a full shirt were seized from the possession of the appellant on 21.10.2000 under Ex.-P/4. Likewise the underwear & frock of the prosecutrix were also seized under Ex.-P/1. All these articles were sent for chemical examination to Forensic Science Laboratory, Raipur under Ex.-P/12, from where the report (Ex.-P/13) was received, according to the report of the Asstt. Chemical Examiner namely- Dr. (Smt.) S. Saxena, blood stains were found on underwear & frock of the prosecutrix marked as Ex.-A1 & A2 and blood stains were also found on the underwear, *loongi* & shirt of the appellant marked as Ex.- C, D & E. Further on Ex.-A1, Ex.-C & Ex.-D i.e. underwear of the prosecutrix, underwear of the appellant & *loongi* of the appellant, semen stains and human spermatozoa were also found whereas neither blood nor semen or human spermatozoa etc. were not found on Ex.-B i.e. slides prepared from the material of surface of hymen. Site plan (Ex.-P/2-A) was also prepared by the Patwari- Laxminath Sahu (P.W.-6) and after completion of usual investigation, the charge-sheet was filed in the Court of Judicial Magistrate, First Class, Raipur, who in turn committed the case to the Court of Sessions, from where it was received on transfer by the Court of Seventh Additional Sessions Judge, Raipur, who conducted the trial and passed the impugned judgment and order dated 11.2.2002, whereby, the

(27)

appellant was convicted and sentenced as aforementioned. It is against this judgment and the order, the appellant has preferred this appeal.

3. The conviction of the appellant is based upon the testimony of the prosecutrix (P.W.-4), her mother (P.W.-1) and chemical examiner's report. The Sessions Court recorded a finding that the prosecutrix was below 12 years of age and she was subjected to rape by the appellant.

4. Learned counsel for the appellant argued that the version of the prosecutrix is not reliable. He also argued that there is no evidence of rape, particularly penetration, partial or complete as the hymen of the girl was found intact and the appellant was entitled to acquittal.

5. On the other hand, learned counsel for the State opposed these arguments. He supported the judgment of conviction and order of sentence passed by the Sessions Court.

6. I have heard the learned counsel for the parties at length and have also perused the records of the sessions case.

7. Ku. Jayalata (P.W.-4) was aged about 6 years and there is no dispute about it. This point is not raised before me also. Moreover, in reply to the question No.5 in the examination of the accused, the accused/appellant has also admitted that she was aged about 6 years and her house was situated just by the side of the house of the appellant.

(28)

8. P.W.-4 (prosecutrix) has deposed vide para-3 that when she was playing along with niece of the appellant in his house, the appellant caught hold of her, took her inside a room and laid down over her and penetrated his penis into her vagina. She has been cross-examined by defence but nothing has been brought on record against her such evidence which she deposed in the above manner.

9. Smt. Resham Bai (P.W.-1), who is the mother of the prosecutrix, deposed that when the prosecutrix came to the house at about 7.30-7.00 p.m., she saw blood stains on her clothes. The blood stains were on her underwear and frock. She came and laid down on the cot in semi-conscious condition and on asking, she stated to her that when she had gone to play in the house of the appellant, the appellant removed her underwear and he laid down over her. The mother also deposed that she saw blood coming out from the private part of the prosecutrix. On this, she called the appellant, the appellant came to their house and she noticed that the blood stains were there on the *loongi* of the appellant. On asking, he denied about such act committed by him. Thereafter they had gone to the police station and the report was lodged. In her cross-examination vide para-7, she had stated that her daughter had only told that "the appellant had laid down over her". About her Court deposition that she saw the blood coming out from the vagina of the prosecutrix, she admitted in the cross-examination that she had not stated such fact to the police. Therefore, on appreciation of

(29)

her evidence, it comes that her daughter had not told her about sexual intercourse committed by the appellant in the manner she was telling in the Court and only said that the appellant had laid down over her, and that she had not seen blood coming out from the vagina of her daughter but she had only seen the blood stains on frock and underwear of her dauther.

10. Premdas (P.W.-3) is the father of the prosecutrix, who was not present in the house at the relevant time and was called by her wife, who ultimately narrated the story to him.

11. Therefore, the story regarding commission of rape by this appellant is totally based upon the evidence of the prosecutrix, which she deposed vide para-1 that the appellant had penetrated his penis into her vagina on account of which blood started oozing out from her vagina and she felt pains. Whether the story regarding penetration can be believed in light of the other evidence on record, particularly on the face of medical evidence ? and in fact, if no penetration has taken place then what should be the position of accused in law and consequently what offence, in fact, is made out, are the questions to be considered.

12. So far as the question of hymen being intact is concerned, in case of a girl of tender age, rupture of hymen, in the event of penetration, is not as a matter of rule. In cases where the hymen is deep seated, it may not rupture though there may be a penetration. In case of a forcible attempt to penetrate also, there are chances that the hymen of the victim may not rupture

(30)

particularly when it is deep seated. The presence of redness and inflammation over the vagina is at least a sign that either a complete penetration has taken place or a partial penetration has taken place or a forcible attempt to penetrate was made against the victim. Modi opines in his Medical Jurisprudence that in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum. Please see **Modi's Medical Jurisprudence and Toxicology, 23rd Edn., page 928**.

13. It was observed in the case of ***Aman Kumar and another vs. State of Haryana, 2004 Cr.L.R. (SC) 207*** vide para-7 that "the rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The *actus reus* is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any

(31)

significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, or the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Parietal penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable u/s. 376 IPC."

14. Further in the matter of ***Tarkeshwar Sahu vs. State of Bihar (now Jharkhand), (2006) 8 SCC 560,*** the Apex Court held vide para-10 that under Section 375 of the I.P.C., six

(32)

categories indicated therein are the basic ingredients of the offence. The Supreme Court observed that in the facts and circumstances of the said case, where the prosecutrix was 12 years of age, her consent was irrelevant. The appellant had forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 of the I.P.C. is penetration which is altogether missing in the said case, the Apex Court said that no offence under Section 376 of the I.P.C. can be made out unless there was penetration to some extent. In the absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the I.P.C. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Section 375 and 376 of the I.P.C. The Apex Court held in para 13 that "in order to constitute rape, what Section 375 IPC requires is medical evidence of penetration and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC."

(33)

15. In the case on hand, on the face of medical evidence and also on the face of evidence of the mother of the prosecutrix, the version of the prosecutrix that there was a complete penetration does not appear to be true. Even a situation of partial penetration or the penetration to some extent or an attempt to penetrate is also not there. The position of labia minora and labia majora would show that the main ingredients to constitute the offence i.e. penetration completely, partially or even slightly, has not taken place in the matter as nothing suggestive from the medical point of view appears in the internal examination of the prosecutrix and the version of the prosecutrix to the extent of penetration cannot be believed. Now the question arises about the presence of blood stains and semen stains and human spermatozoa on the underwear of the prosecutrix, underwear of the appellant and *loongi* of the appellant. It appears that the appellant had prepared himself for sexual intercourse and while making the attempt therefor the emission took place and semen stains and human spermatozoa came on the said articles. There was an injury on the private part of the appellant also but there was no injury, whatsoever it may be, in the private part of the prosecutrix, therefore, the possibility of the blood stains on these articles can be attributed to the appellant alone for which there may be many reasons and merely their presence on such articles cannot support the version of the prosecutrix regarding rape in absence of any positive local evidence regarding even the slightest force applied by the appellant. It is

(34)

also important to mention that no semen or human spermatozoa was found on the slides prepares from the vagina material. As stated above, the said version of the prosecutrix is even not corroborated by her mother who admitted that the prosecutrix had only told her that the appellant had laid down over her.

16. Therefore, in the opinion of this Court, it was not a case of rape and an offence under Section 376 (2) (*f*) I.P.C. would not be made out, instead, it would fall under Section 376 (2) (*f*) read with Section 511 I.P.C. as the appellant had prepared himself for commission of rape and in furtherance, he laid down on the prosecutrix resulting into pre-penetration emission and his act would be an act of attempt to commit rape and I hold it accordingly.

17. The conviction and sentence awarded to the appellant under Section 376 (2) (*f*) I.P.C. are set aside. He is convicted under Section 376 (2) (*f*) read with Section 511 I.P.C. and sentenced to undergo R.I. for 5 years and to pay a fine of Rs.500/-. In default of payment of fine, the appellant shall further undergo R.I. for 2 months.

18. The appeal is partly allowed to the extent indicated above.

Sd/-
SUNIL KUMAR SINHA
Judge

vatti